Supreme Court, U.S.
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No. 99-1206

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL F. HAHN and
MARIE HAHN,

Petitioners,

v.

STAR BANK, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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This response addresses the Respondents misstatements as they appear in their Brief In Opposition.

A. RESPONDENTS' STATEMENT OF THE CASE

Respondents base their argument on a facially valid subpoena, which is in conflict with 15 U.S.C. § 1681b(1). *See* Petition, p. 3. The District Court did not rule on the subpoena, *see* Petition, District Court Opinion and Order-3/26/98, p. 59a, footnote 2: ". . . The Hahns raise numerous issues relating to the propriety of the subpoena. The Court need not address these issues to reach its conclusion." The Sixth Circuit incorrectly ruled that an "appearance of 'an order of a court'" is sufficient under the FCRA, overruling the 1989 Congressional amendment.

The six questions presented in the Petition are based on the Sixth Circuit's affirming the District Court's decision. (The Sixth Circuit reversed the District Court's decision on color of law.) All of the other District Court's rulings on the issues were affirmed by the Sixth Circuit.

After Mr. Fusco informed us that Star Bank's counsel had called him every day for 2 weeks demanding an affidavit, concerning his receipt of the subpoena, Mr. Fusco provided us with an affidavit which stated that he had no recollection of receiving the subpoena. Mr. Fusco later recanted his affidavit and gave Star Bank an affidavit saying that he didn't remember. Mr. Fusco's conflicting affidavits needed to be resolved in discovery, by deposition.

Star Bank could have moved to object to the overly broad subpoena under Ohio Rule 45:

> (C) Protection of Persons Subject To Subpoena.

> (2)(b) . . . If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued.

(Obviously Ohio law does not recognize an attorney issued subpoena as an order of a court, neither does the FCRA.) Star Bank mailed our entire loan file, *ex parte*, to Mr. Gonzales. *See* Petition, pp. 10 and 11. Respondents never asserted that Mr. Fusco was provided with a copy of the file even though the Rule 45 subpoena was used for discovery of the file.

Star Bank knew that the subpoena was invalid under the FCRA, but deliberately disseminated the "specifically requested" documents relating to construction loan No. 13953. *See* Petition, p. 28 at #4:

> . . . All the documents in Star Bank's possession had been gathered solely to assess Michael and Maria Hahn's financial status, credit worthiness, and eligibility to receive a construction loan from Star Bank, Loan No. 13593.

This proves that Star Bank willfully disseminated a consumer report under the FCRA without a valid order of a court. *See Zamora v. Valley Fed. Sav. & Loan Ass'n.*, 811 F.2d 1368, 1371 (10th Cir. 1987):

> . . . Both are vice-presidents of defendant, a savings and loan which does frequent consumer checks and which has a compliance officer, an in-house attorney, to ensure compliance with federal statutes, such as the FCRA.

Respondents attempt to mislead this Court as to the time of Mr. Elsass's suspension in this instant case. *See* Petition, Court of Appeals Opinion-9/2/99, p. 5a:

> In November of 1997, discovery was stayed by the magistrate pending a decision on Star Bank's motion. Also in November of 1997, the Hahns' attorney, Elsass, was suspended from the practice of law for reasons unrelated to the Hahns' case. The Hahns have been proceeding *pro se* since that time.

Mr. Elsass was suspended the day after the pre trial conference in which discovery was stayed. He told us that the Magistrate had told him that Star Bank's motion was being treated as a Motion to Dismiss and that he had until January 5, 1998 to amend to a 42 U.S.C. § 1983 cause of action. He told the magistrate that he would move for discovery if any motions for summary judgment were filed, (as the order reflects). *See* Petition, Court of Appeals Opinion-9/2/99, p. 23a.

There was *no* discovery in this instant case in which to dispute any factual evidence. Summary judgment was only granted to the *Star Bank Defendants*. *See* Petition, District Court Opinion and Order- 5/11/98, p. 34a.

B. RESPONDENT'S REASONS FOR DENYING THE WRIT

Section I.

Respondents misconstrue Question IV of the Petition which asks this Court to decide the issue of what defines a consumer report and when a consumer report is protected under the FCRA. Question V of the Petition pertains to Star Bank as a consumer reporting agency. Question VI of the Petition

pertains to disclosure of the file. The Respondents are attempting to crossover the Questions and the issues to mislead this Court on the importance of *each* Question.

Questions II, IV and V were certainly discussed by the Sixth Circuit.

1. Question II--The Sixth Circuit applied the rulings in *In Re Grand Jury Proceedings*, 503 F. Supp. 9, 12, a Federal grand jury case, to this instant case, a civil litigation case involving inferior drywall. The Sixth Circuit sanctioned that an "appearance" of a court order signed by an attorney is the equivalent of a judge's signature for an order of the court under the FCRA. *See* Petition, Court of Appeals Opinion-9/2/99, p. 7a.

2. Question IV pertains to the definition of a consumer report and its protection under the FCRA. *See* Petition, Court of Appeals Opinion-9/2/99, p. 8a. The Sixth Circuit refers to the TRW credit report in our loan file. The Sixth Circuit does not reverse the District Court's decision that the loan file, including the TRW report, is not a consumer report or that a consumer report becomes a non-consumer report when it is disseminated from a user, (Star Bank), to a third party user, (Mr. Gonzales). *See* Petition, District Court Opinion and Order-5/11/98, pp. 30a, 3la: "The FCRA imposes liability only for dissemination of consumer credit reports by consumer reporting agencies."

3. Question V pertains to Star Bank as a consumer reporting agency. The Sixth Circuit makes reference to Star Bank as a consumer reporting agency. *See* Petition, Court of Appeals Opinion-9/2/99, p. 8a: ". . . even assuming that FCRA's requirements apply to Star Bank. (*See* 15 U.S.C. § 168la(f) for the definition of a 'consumer reporting agency')." The Sixth Circuit affirmed the District Court's decision that Star

Bank was not acting as a consumer reporting agency in this instant case.

Because the issues in Questions II, IV and V of the Petition were explicitly set forth in the Court of Appeals Opinion and the District Court was not reversed, but affirmed concerning these issues, the Sixth Circuit did decide these issues.

Question VI states: "Whether a bank, acting as a consumer reporting agency, has to disclose all information in its file to a consumer?" The Sixth Circuit affirmed the District Court's decision that Star Bank was not acting as a consumer reporting agency in this instant case and that our TRW credit report is not a consumer report and then ruled that all of our FCRA claims are barred by the statute of limitations. Taking it a step further, the Sixth Circuit ruled that Star Bank did not have to disclose ". . . the nature and substance of all information in its files" (15 U.S.C. § 1681g), even if Star Bank was a consumer reporting agency. *See* Petition, Court of Appeals Opinion-9/2/99, p. 8a. The Sixth Circuit erroneously ruled that Star Bank acting as a consumer reporting agency, would not have to disclose the truth about the subpoena in the loan file.

Jeff Bonynge, representative of Star Bank, acting as a consumer reporting agency in this instant case, stated in his conversation with Petitioner Michael Hahn, on July 3, 1995:

> It it may . . . I can tell you that our general, uh, process when we are subpoenaed is to, uh communicate with our counsel and typically they go through the file and pull out what they feel is being specifically asked for and then remove what is considered personal and confidential which is . . .

At the time of this conversation, Mr. Bonynge knew that he had disseminated a consumer report in response to the subpoena, as per # 4 of his affidavit. If he had disclosed to us that the subpoena had to be an order of the court signed by a judge and that it was not valid, we would have filed a lawsuit at that time. Mr. Bonynge knew that the truth would be material to Star Bank's liability in this matter and he chose to fraudulently conceal the truth, that Star Bank had violated the FCRA.

Respondents claim that we misstated the Sixth Circuit's ruling on the subpoena. Because the Sixth Circuit cited a 1980 FCRA case, *In Re Grand Jury Proceedings*, 503 F. Supp. 9, 12:

> reasoning that an "order of a court" under this section of FCRA may be oral, may be a paper bearing the word "order" that is "signed by a judge or other judicial officer [,] [o] it may be a subpoena, writ of execution or other process")

Respondents misunderstand this ruling in light of the fact that bank counsel looked at the subpoena.

Star Bank acted as a consumer reporting agency in this instant case when it disseminated our consumer report to a third party without a valid order of the court under the FCRA, for an impermissible purpose, litigation. We requested disclosure of our loan file from Star Bank 4 times in March and April of 1997. Star Bank did not deny that they had a duty to disclose our file to us or state that they would not disclose our file to us. The only correspondence from Star Bank on this matter stated that they couldn't find our file and that they would get back to us when they found it. Under 15 U.S.C. § 1681g, Star Bank had to disclose the file to us. The Sixth Circuit, by affirming the District Court's decision, that Star Bank was not acting as a consumer reporting agency, a genuine issue in dispute, ignored

a statute of limitations under the FCRA which started to run in April, 1997, two months before this instant lawsuit was filed.

Question VI of the Petition pertains to the duty of a consumer reporting agency in disclosure under the FCRA; it does not merely allege "erroneous factual findings with respect to misrepresentations by a Star Bank representative."

Section II.

Respondents use the words "sufficient discovery" and "additional discovery" in their brief. In fact, there was *no* discovery in this instant case. Respondents misquote the Magistrate's order. *See* Petition, Court of Appeals Opinion-9/2/99, p. 23a. The word "additional" is not in the order.

In conflict with Civil Rule 56(c) there are *no* "depositions, answers to interrogatories, and admissions on file." The evidence of Star Bank's liability, as a consumer reporting agency under the FCRA, is in Star Bank's possession. Without "full opportunity to conduct discovery," we could not "present affirmative evidence" of Star Bank's violations and liability under the FCRA. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

We were never notified by the Court that Star Bank's Motion To Dismiss was being converted to a Motion For Summary Judgment. When the Gonzales Defendants filed a Motion For Summary Judgment, we filed a Motion For Discovery, following the Magistrate's order on discovery. We question at this point whether we were required to file a 56(f) affidavit as the Gonzales Defendants demanded because there was *no* prior discovery in this instant case. Respondents point out that a 56(f) affidavit is filed for "additional discovery." Respondents claim that the Sixth Circuit reviewed our 56(f) affidavit and decided that "none of the additional discovery

requested was relevant to its decision" and that we had not been "substantially prejudiced." This proves that the Sixth Circuit is in conflict with *Anderson, supra*, 477 U.S. 242 (1986) and *Celotex v. Catrett*, 477 U.S. 317 (1986), in ruling on our 56(f) affidavit when there was no prior discovery in this instant case. *See Anderson, supra*, 477 U.S. 242 at 250, footnote 4:

> This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

The Sixth Circuit affirmed the District Court's decision not to rule on our Motion For Discovery, before our 56(f) affidavit filed later for "additional discovery" could be considered. Contrary to Respondents' claim, *Anderson, supra*, 477 U.S. 242 and *Celotex, supra*, 477 U.S. 317 could not be properly applied to this instant case when the specific rulings in these cases for full opportunity to conduct discovery were not first followed.

Respondents falsely state: "While Mr. Barresi's affidavit was among the evidence that the court considered, it was not the sole evidence." *See* Petition, District Court Opinion and Order-3/26/98, p. 62a:

> . . . The Court concludes that based on this evidence, [referring to Mr. Barresi's affidavit], Star Bank satisfies its burden on summary judgment to establish the absence of a genuine issue of material fact as an element for which Plaintiffs will bear the burden at trial.

The Sixth Circuit did not reverse the summary judgment granted to Star Bank, with no discovery, by the District Court, on the sole evidence of the affidavit of Mr. Barresi, a Star Bank employee. Instead, the Sixth Circuit ignored the genuine issue in dispute, whether Star Bank was a consumer reporting agency in this case, and erroneously used the statute of limitations to dismiss this case.

Section III.

In ruling on color of law, the District Court correctly applied *Timson v. Weiner*, 395 F. Supp. 1344 (S.D. Ohio 1975) in which state subpoena power was misused by an attorney to violate constitutional rights. The Sixth Circuit applied *Barnard v. Young*, 720 F.2d 1188 (10th Cir. 1983) in which the state subpoena power was not misused by an attorney and no constitutional rights were violated. *See Timson v. Weiner*, 395 F. Supp. at 1348: "A subpoena is the order of an arm of the state compelling the presence of a person under threat of contempt." Respondents have argued that they were under compulsion of law to produce the file (*ex parte*). Mr. Gonzales used an attorney to serve the subpoena as provided by Ohio Rule 45. *See Georgia v. McCollum*, 505 U.S. 42, 53 (1992): "The State cannot avoid its constitutional responsibilities by delegating a public function to private parties. *Cf. Terry v. Adams*, 345 U.S. 461 (1953)." The public function theory was followed in *United States v. Wiseman*, 445 F.2d 792 (2d Cir. 1971).

Our amended Complaint included a cause of action based on a denial of procedural due process and a separate cause of action for 42 U.S.C. § 1983. *See* Petition, pp. 8-13. Our property interest under the Fourteenth Amendment in the protection of the privacy of our consumer report under the FCRA was argued below.

Congress dictated the appropriate hearing under the FCRA which is a motion for an order *through* the court, providing a judge's review and signature, before deprivation of the privacy of a consumer report.

Respondents have not provided any evidence that due process was followed in the *ex parte* production of our loan file, which contained a consumer report. Mr. Fusco, in his affidavit states: "4. I have no recollection of any notice from Star Bank or John Gonzales that in fact, the documents were being produced prior to trial and that Star Bank was not appearing at trial." Mr. Fusco did not recant this part of his affidavit. As a trial lawyer, Mr. Fusco would not have knowingly allowed an *ex parte* production of documents to his disadvantage.

The *ex parte* production of our loan file was fraudulently concealed. Mr. Bonynge less than 2 years later fraudulently concealed the illegality of the *ex parte* production once again. *See Jones v. Transohio Sav. Ass'n*, 747 F.2d 1037 (6th Cir. 1984), at page 1043. The Sixth Circuit ruled that fraudulent concealment can not be decided without discovery.

CONCLUSION

For the foregoing reasons, our Petition for Writ of Certiorari should be granted.

/s/_____
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